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ABSTRACT

This paper outlines and explains legal issues related to race-based affirmative action, which is defined as race-conscious action designed to overcome manifest racial imbalance. The paper highlights the history of affirmative action and its following objectives: (1) to overcome the effects of past discrimination; (2) to ensure against future discrimination; (3) to promote diversity; (4) to overcome a two-class society characterized by racial division; and (5) to provide equitable distribution of economic resources. Sections review constitutional law of affirmative action, federal and state laws bearing on school district use of affirmative action, and the status of challenges to affirmative action. The conclusion highlights situations in which affirmative action is required, permitted, and forbidden. (LMI)

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I. Introduction

A. I need to begin with a confession. I spent much of my early career suing school boards on behalf of the federal government. Our job was to enforce Brown v. Board of Education, which forbids intentional racial segregation in the public schools. School board members were among the finest defendants I ever sued. Indeed, many of them agreed that segregation was wrong and welcomed the federal court suits; even where the boards strenuously fought our cases, most of them conscientiously complied once a federal court order was entered, and school boards throughout the south now enthusiastically embrace school desegregation based on their experience in complying with those decrees.

B. Affirmative action is an issue faced by all school boards. You need to know:

1. When are you required to engage in affirmative action;
2. When are you permitted to engage in affirmative action;
3. When are you forbidden to engage in affirmative action.

It raises important policy questions and a host of legal questions.

4. Dilbert [O-1] -- this is known as the zero sum issue. Some believe that in the long run affirmative action benefits us all. Others believe we are faced with a zero sum condition in which for every winner there must also be a loser. The latter group is further divided into those who believe that the zero sum should invalidate all affirmative action and those who believe that affirmative action is worth the cost. The zero sum issue has become heightened by economic conditions of the past few years.

C. Definition of affirmative action. [O-2]

1. For purposes of simplicity, discuss race-based affirmative action.
2. Race-conscious action designed to overcome manifest racial imbalance. This definition covers a broad range of activity.
   a. Broadening of recruiting base, to
   b. Rigid racial quotas.

D. Plan of this presentation [O-3]

1. History of affirmative action

EA 027 315

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2. Objectives of affirmative action
3. Constitutional law of affirmative action
4. Laws bearing on school district use of affirmative action
    a. Federal
    b. California
5. Status of challenges to affirmative action
6. Conclusion

II. History of affirmative action

A. Modern affirmative action first emerged as a tool to fight overt and entrenched race and sex discrimination. The words "affirmative action" signify that passivity will not end discrimination or its effects. Perhaps its first modern use in the context of race discrimination occurred in May of 1941 when President Roosevelt, under pressure from African American labor leaders to end discrimination in the workplace, told his National Defense Advisory Council to "order taking Negroes up to a certain percentage in factory order work. Judge them on quality -- the 1st class Negroes are turned down for 3rd class white boys." The Advisory Council's response was "If we set a percentage it will immediately be open to dispute; quiet work with the contractors and the unions will bring better results." Roosevelt then signed an executive order calling for "the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color or national origin."

B. In 1965 President Johnson issued an executive order imposing nondiscrimination and affirmative action obligations on federal government contractors. That executive order was strengthened by President Nixon, whose administration in 1969 imposed goals and timetables for minority employee utilization. School busing as a tool to promote racial integration emerged in this period, as did affirmative action in higher education, voting, and government contracts. However, today, over 50 years from the first modern use of affirmative action, most Americans agree that stark disparities remain. To some that is a reason to continue affirmative action; others argue that affirmative action is a failed strategy.

III. Objectives of affirmative action [O-4]

A. Overcome the effects of past discrimination [reparative].
    1. By the actor.
        a. School busing as an example.
    2. By the state.
    3. By society.

B. Ensure against future discrimination [prophylactic].
    1. E.g., your personnel department consistently seems to not hire people of color, and you both want to follow a non-discrimination policy and also fear

exposure to a fair employment suit. Setting a goal for personnel department to hire more people of color might be one way to achieve your objective.

C. Promote diversity.
   1. Applies primarily in educational setting.
   2. E.g., this could not be an objective of a program to set aside public contract dollars for minority contractors.

D. Overcome two-class society characterized by racial division.
   1. This objective stems from the belief that division weakens our social and economic fabric.
   2. For example, one state affirmative action law says it will "maintain and strengthen the overall economy of the state." [Pub. Con. Code §10115(a)(2)].

E. Provide fair share of the pie to all groups.

F. Perhaps other objectives might also exist.

What needs stressing is that some of these objectives have been found valid reasons for affirmative action, but others have been found invalid, and D. is untested.

IV. Constitutional law of affirmative action

A. Unsettled. Like society, the Supreme Court has been very divided on affirmative action issues, with one exception which I'll mention below. If your lawyers have been giving you "on the one hand, but on the other hand" answers to your questions about affirmative action, this is the reason.

B. The rule today answers our three questions this way: sometimes race-conscious affirmative action is constitutionally required, sometimes it is permitted, and sometimes some forms of affirmative action are constitutionally forbidden.

C. The Supreme Court has decided several affirmative action cases involving education. [O-5]
   1. One set of cases involved schools which had been racially segregated by law, in violation of the rule of Brown v. Board of Education, which had held that the Constitution forbids the state to purposefully segregate schools by race. In 1968 the Court said such school districts had the affirmative duty to eliminate discrimination root and branch and to convert to systems without black schools and white schools, but with "just schools." [OBJECTIVE IIIA1] The following year the Court agreed with a lower federal court which had ordered the segregated faculties of the schools of Montgomery, Alabama to be desegregated, with a "goal" of having the ratio of black and white teachers in each school mirror the ratio in the system as a whole. In 1971 the Supreme Court held that formerly segregated school systems could be

required to bus students in order to overcome the effects of the past discrimination. It also, however, uttered words that are relevant to school boards which have not segregated schools in the past, and I want to read them to you:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude ... that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities...." [402 U.S. 16]. [OBJECTIVE IIIC]

This is the one unanimous decision I mentioned above.

2. Two other cases grappled more directly with the right of school authorities with no history of past discrimination to adopt affirmative action programs. The first, the Bakke case, involved higher education. There was no majority opinion, but Justice Powell, the swing Justice in the case, wrote a very influential opinion holding that U.C. Davis Medical School could not impose admissions quotas to overcome the effects of societal discrimination [OBJECTIVE IIIA3] but that it could use race as a plus factor in order to achieve a diverse student body [OBJECTIVE IIIC]. Justice Powell said the University's desire to overcome general societal discrimination could not justify affirmative action, but the educational decision to seek diversity could justify affirmative action [but not quotas]. This idea of diversity as a legitimate goal was upheld by the Court in 1990 case regarding the award of broadcast licenses. The other school case, decided in 1986, held that the Jackson, Michigan school district could not adopt employment quotas for teachers in the absence of strong evidence that the quota was needed to overcome the effects of past discrimination by the school system. In that case the quota was designed to ensure that the racial composition of the teachers matched the racial composition of the student body. [OBJECTIVE IIIC+] The Court said that this was an impermissible objective. This ruling has significance in California, where over half the students are children of color but 80% of the teachers are white. The Court has made it clear that where affirmative action in employment is warranted, the employer should be seeking to

bring its work force into line with the qualified labor market, not with student enrollments or general population statistics.

D. I want to mention two other lines of cases which, although school districts were not parties, would govern some forms of school district affirmative action.

1. The Court has decided three cases involving minority set-asides for government contracts. The bottom line is that such set-asides may be used to overcome effects of past discrimination in the governmental entity's program, where necessary; [OBJECTIVE IIIA1] they may not be used simply to overcome past societal discrimination, [IIIA3] but it is unclear whether they may be used to accomplish other objectives. When used they must be very carefully drawn so that they go no further than is necessary to meet the objective. Great care must be exercised in setting the percentage figures for the set-aside, selecting the favored groups, and insuring that waivers are truly available when qualified sub-contractors from those groups cannot be found.

2. The Court has upheld some public sector employment goals and even quotas, where it was convinced that they were necessary to overcome past discrimination [IIIA1] or where the employer's or union's intransigence made race-conscious relief necessary. [IIIB]

E. To summarize, the Supreme Court has shied away from any absolute rule as to affirmative action. It has approached the issue as one requiring the drawing of fine distinctions. Allow me to oversimplify a bit. State and local governments may adopt race conscious measures only to advance a compelling state interest, such as achieving diversity or overcoming past discrimination or ensuring against future discrimination. The measures employed must be as narrow as possible; they must not unduly trammel the rights of others. In sum, the Court has recognized the troublesome nature of race conscious government actions, but has also accepted that race consciousness is sometimes proper, or even required.

V. Statutes and regulations regarding affirmative action

A. Federal -- A variety of federal laws and regulations bear on school districts and affirmative action.

1. Title VI of the Civil Rights Act of 1964 forbids racial discrimination in federally assisted programs. Title VI itself imposes no different substantive obligation on school districts than the Constitution imposes. However, regulations of the Department of Education under Title VI not only require affirmative action to overcome the effects of past discrimination, but also emphasize that

even if affirmative action is not required it may be permissible, and they explain the circumstances where it may be permissible: [O-6]

a. "Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." [IIIB?] [34 C.F.R. 100.3(b)(6)(ii)].

b. The regulations later underscore this statement: [O-7] "Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served." [34 C.F.R. 100.5(i)].

2. The federal fair employment laws have been construed to permit even public sector employers to adopt affirmative action plans to overcome a manifest imbalance in the work force. [IIIB?] Manifest imbalance is measured by comparing the employer's work force with the pool of individuals qualified for the job. The federal fair employment laws also forbid employers to use employee selection devices which disproportionately exclude women or persons of color unless those devices have been shown to be valid predictors of successful job performance and no less exclusionary device is available.

3. Other laws may require the use of affirmative action. For example, the Americans with Disabilities Act and the Individuals with Disabilities Education Act require affirmative action to ensure inclusion of disabled persons in educational programs.

B. State law -- the state has adopted both general non-discrimination laws, with standards very similar to the federal law standards, and more specific provisions which affect school districts. I'll address the latter. They require affirmative action in employment and allow it in contracting and student assignment.

1. In 1977 -- a year before the Bakke decision -- the Legislature added to the Education Code provisions requiring school districts to employ affirmative

action in their employment practices. The purpose sections of the legislation mention several objectives, including diversity and overcoming past discrimination and equalizing opportunity. The law required school districts to file affirmative action plans with the State Department of Education by 1979. This act contains the following definition: [O-8] "'Affirmative action employment program' means planned activities designed to seek, hire, and promote persons who are underrepresented in the work force compared to their number in the population, [THIS IS NOT A PROPER COMPARTOR UNDER FEDERAL LAW] including individuals with disabilities, women, and persons of minority racial and ethnic backgrounds. It is a conscious, deliberate step taken by a hiring authority to assure equal employment opportunity for all staff, both certificated and classified. Such programs require the employer to make additional efforts to recruit, employ, and promote members of groups formerly excluded at the various levels of responsibility who are qualified or may become qualified through appropriate training or experience within a reasonable length of time. Such programs should be designed to remedy the exclusion, whatever its cause. Affirmative action requires imaginative, energetic, and sustained action by each employer to devise recruiting, training, and career advancement opportunities which will result in an equitable representation of women and minorities in relation to all employees of the employer." Education Code, §44101(a) A State Department of Education regulation provides: "Each public education agency will develop and implement an affirmative action employment program for all operating units and at all levels of responsibility within its jurisdiction." [O-9] [Calif. Admin. Code, Title 5, sec. 31].

2. In 1987 the legislature adopted a law authorizing local agencies such as school districts to establish goals and requirements for minority and women business enterprises to participate in contracts. This law defines minority or women business enterprise and sets out detailed criteria which minority business preferences would have to satisfy. [Public Contract Code, §2000

3. The California Constitution was amended in 1979 to forbid California courts from ordering school busing not required by the United States Constitution, and the Supreme Court upheld the constitutional validity of that amendment. That same amendment, however, allows school districts to

voluntarily adopt such plans. Until 1991 the State Department of Education required school districts to alleviate and prevent racial segregation, but those regulations were repealed so that desegregation would no longer be treated as a state-mandated program requiring state reimbursement.

VI. Status of challenges to affirmative action

A. President Clinton ordered a review of federal affirmative action policies in March of this year. Based on that review, on July 19 he issued a two-pronged memorandum to his administration: [O-10]

1. "This Administration will continue to support affirmative measures that promote opportunities in employment, education and government contracting for Americans subject to discrimination or its continuing effects."
2. [O-11] "[A]ny program must be eliminated or reformed if it:
   a. creates a quota;
   b. creates preferences for unqualified individuals;
   c. creates reverse discrimination; or
   d. continues even after its equal opportunity purposes have been achieved."

B. Governor Wilson has taken three major actions regarding affirmative action.

1. In June he repealed several executive orders which had required affirmative action and he ordered executive agencies to eliminate affirmative action programs not required by state or federal law. He also requested other agencies, including the State Board of Education, to also eliminate affirmative action not required by law.
2. In July the Regents of the University of California adopted resolutions, supported by the Governor, disapproving race-conscious student admissions, employment practices, and contracting practices by the University. These resolutions do not directly affect school district practices, but may affect your students.
3. In August he filed a lawsuit in a state appellate court asking that several state laws requiring affirmative action be declared unconstitutional. The suit attacks the public contracting law I mentioned earlier, but does not attack the law regarding affirmative action in school district employment practices. On October 24 the court of appeals denied the Governor's suit, without opinion, leaving us in the dark as to whether the court thought the Governor had no case or thought the suit had been filed in the wrong court. The

Governor has appealed this ruling.

C. The CCRI

1. As you know, a proposed constitutional amendment is being circulated, which the sponsors call the California Civil Rights Initiative. The Initiative would add to the California Constitution this language: [O-12] "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, **public education,** or public contracting."

2. The meaning of the CCRI is unclear. The Constitution already forbids discrimination based on these classifications, so the new language is the reference to "preferential treatment." Clearly it is meant to ban some affirmative action, and maybe all affirmative action. It would apply to school district actions. Possible effects, if the CCRI were adopted, would include:

   a. A ban on voluntarily adopted race-conscious student assignment plans, such as busing plans or magnet schools for the purpose of racial integration.

   b. Elimination or redesign of at least some of the state's programs designed to improve the preparation for college of secondary-school students from racial and ethnic groups which are historically under-represented in postsecondary education, such as MESA, the Mathematics, Engineering, Science Achievement program.

   c. A ban on voluntary affirmative action in school district employment practices.

   d. A ban on voluntary affirmative action in school district contracting practices.

   I say these are **possible** effects of the CCRI, because there is sure to be a period of uncertainty while the reach and validity of CCRI are being considered in the courts. The CCRI would not affect affirmative action programs designed to help disabled students or employees or various veterans preferences extended by state law. In addition, school districts would be free to seek other types of diversity, based on such criteria as socio-economic status, though challenges might be mounted if it appeared that these criteria were simply proxies for race.

3. Last July the California Senate Office of Research summarized the opinions of four law school professors [I am one of the four] on the question whether the CCRI is constitutional. All agreed

that the initiative would be unconstitutional insofar as it banned programs aimed at remedying past discrimination by California public entities. Some of us thought it would encounter other constitutional problems.

VII. Conclusion

A. When is affirmative action required? The Constitution requires it when necessary to overcome past discrimination by the school district and does not otherwise require it. Federal law otherwise does not require school districts to engage in affirmative action, but state law requires it at least in employment and contracting. That state law is subject to change, either legislatively or by passage of the CCRI. So far, the attempt to change it in the courts has failed. Even where required, it must be carefully tailored so as to be no more intrusive on the rights of others than is absolutely necessary.

B. When is affirmative action permitted? The Constitution allows race-conscious student assignments to schools to promote integration. As to employment, it seems unlikely that the Court will allow race-based hiring or promotion practices for the purpose of providing role models, but it might allow some mild form of race consciousness to promote diversity in faculty; even if it does, diversity standing alone would probably not justify race conscious hiring of employees other than teachers. Once hired, the Court may allow assignment of teachers to schools to promote diversity. On these questions we are essentially sailing uncharted waters. Some race consciousness may also be allowed to ensure against race discrimination, where there is some basis for believing discrimination exists. Federal and state statutes are more permissive, but adoption of the CCRI could change state laws.

C. School districts may not employ affirmative action for the purpose of allocating equal pieces of the pie based on membership in particular racial, ethnic or gender groups or for the purpose of matching the racial composition of the faculty with the racial composition of the student body. If the CCRI or equivalent is passed and upheld by the courts, school districts will also be forbidden to employ affirmative action to achieve diversity or even to overcome past discrimination.

D. In sum, you must use it sometimes, you may use it sometimes, and you are forbidden to use it at other times. The law in the area is complex, and whether you are considering initiating or abandoning or continuing affirmative action, only a lawyer familiar with the law and with the particulars of your school system can advise you whether your course of action meets the requirements of the law.